SUPREME COURT OF NOVA SCOTIA
Citation: *Babineau v. SaltWire*, 2021 NSSC 298

Date: 20211104
Docket: Hfx No 506698
Registry: Halifax

Between:

Wade Babineau, Jo Ann Crawford, Wendy MacFadyen, Mary McLellan, Paul Pettipas and Lorielee Steele

Applicants

v.

SaltWire Network Inc.

Respondent

JURISDICTION DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	October 6, 2021, in Halifax, Nova Scotia
Written Decision:	November 4, 2021
Counsel:	Anna-Marie Manley and Emily Hunter, for the Applicants Grant Machum and Killian McParland, for the Respondent

By the Court:

[1] This is a motion by the Respondent, SaltWire Network Inc. ("**SaltWire**") seeking the following:

(a) staying this proceeding on the basis that this Honourable Court should decline to exercise its territorial competence in favour of a more appropriate forum pursuant to Part 1 of the *Court Jurisdiction and Proceedings Transfer Act*;

(b) requesting that the Supreme Court of Prince Edward Island accept a transfer of this proceeding, pursuant to Part 11 of the *Court Jurisdiction and Proceedings Transfer Act*;

(c) alternatively, severing or separating the claims of the individual Applicants and directing that each Applicant may only pursue their claim(s) against the Respondent individually and by separate proceeding;

(d) alternatively, converting the proceeding from an application to an action;

(e) alternatively, providing case management or directions for the fair and efficient conduct of this proceeding.

The Applicants commenced this Notice of Application in Court in Nova Scotia. It is in the early stages of litigation and a Notice of Contest has not been filed.

Background:

[2] SaltWire is an Atlantic Canadian Media Company incorporated under the laws of Nova Scotia with head offices in Halifax. In 2017 SaltWire was founded after acquiring the assets of Transcontinental Inc. ("**Transcontinental**"). As a

result of that acquisition, SaltWire presently owns two dozen publications across Nova Scotia, Newfoundland and Labrador, and Prince Edward Island ("**P.E.I.**"). SaltWire does business in Nova scotia under several business names such as The Chronicle Herald. SaltWire does business in P.E.I. under several business names such as The Guardian.

[3] The six Applicants are all former P.E.I. employees of SaltWire. They range in age from 50 – 58 years and have been continuously employed by Transcontinental and SaltWire for between 19 years and 33 years. All were employed at a production facility located in Charlottetown both before and after the 2017 acquisition. All six signed a new employment contract with SaltWire at the time of the acquisition.

[4] SaltWire contends that in March, 2020 its business was significantly impacted by the COVID-19 pandemic. Revenues were substantially reduced. On March 24, 2020 SaltWire laid off approximately 237 employees across the company. These Applicants were part of that layoff. On June 23, 2020 SaltWire provided written notice to 111 employees, including these Applicants, that their employment contracts had been frustrated. That notice ended these Applicants' employment as of September 1, 2020.

[5] On June 10, 2021 the Applicants filed a joint Notice of Application in Court in Nova Scotia. The following assertions are advanced:

- That the termination clause in SaltWire's employment contract is void for violation of the minimum standards set out in the Nova Scotia *Labour Standards Code*.
- That the contract is void for lack of consideration.
- That the SaltWire contract was signed under duress and is not binding on the Applicants.
- That the SaltWire contract was not frustrated, by COVID-19, or otherwise, and that the Applicants' termination was on a without-cause basis.
- That these terminations were a bad faith attempt to avoid termination obligations to their long-term employees.

The Applicants seek damages for wrongful dismissal, punitive damages, and costs.

Position of the Parties:

[6] SaltWire's position on the motion is stated as follows at paragraph 35:

> While SaltWire does not dispute that this Honourable Court has territorial competence (jurisdiction *simpliciter*) because it operates in this province, the Court should decline to exercise such territorial competence because the Courts of Prince Edward Island are a clearly more appropriate forum (*forum conveniens*) for the litigation.

The Applicants' position on this motion is that Nova Scotia presents as the best forum for a just, speedy, and inexpensive determination of this proceeding.

Applicable Law:

[7] SaltWire brings this motion pursuant to *Civil Procedure Rule* 5.14 and the *Court Jurisdiction and Proceedings Transfer Act* ("**CJPTA**"). *Rule* 5.14 states as follows:

> **5.14** (1) A respondent who maintains that the court does not have jurisdiction over the subject of an application, or over the respondent, may make a motion to dismiss the application for want of jurisdiction.
>
> (2) A respondent does not submit to the jurisdiction of the court only by moving to dismiss the application for want of jurisdiction.
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> (3) A judge who dismisses a motion for an order dismissing an application for want of jurisdiction must set a deadline by which the respondent may file a notice of contest.

This *Rule* permits a respondent to make a motion dismissing an application for want of jurisdiction. In assessing such a motion, the courts apply a two-step approach. The first step determines whether the filing court has jurisdiction. The second step determines whether there is a more convenient forum to decide the matter.

[8] In *LED Roadway Lighting Ltd. v Alltrade Industrial Contractors Inc*., 2019 NSSC 62, the Court stated at paragraph 46:

> … The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction, which arises where a non-resident defendant is served with an originating court process out of the territorial jurisdiction of the court pursuant to its Civil Procedure Rules. That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

The parties herein acknowledge that Nova Scotia has territorial competence on the basis that SaltWire is a Nova Scotia organization with its corporate offices in Halifax.

[9] This process was canvassed by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd*., 2012 SCC 17, under the hearing "Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction". The Court states at paragraphs 101 and 102:

> [101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
>
> [102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non*

> *conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

Given that the territorial competence of Nova Scotia is admitted, the focus shifts to ss. 4(e) and 11 of the CJPTA. Section 4(e) states that a court has territorial competence in a proceeding that is brought against a person only if, "there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based."

[10] In order for this Court to decline jurisdiction, once territorial competence has been established, SaltWire then bears the onus of showing that there is another jurisdiction that is clearly more appropriate in which to have the matter heard. In *New World Merchant Bank Inc. v. Radient360 Solutions Inc.*, 2018 NSSC 227, the Court commented at paragraphs 31 – 32:

> [31] The party seeking to have the Nova Scotia courts, despite having territorial competence to hear the matter, exercise the discretion to not hear the matter, has to show that there is another jurisdiction that is clearly more appropriate in which to have the matter heard. The selected forum, here Nova Scotia, "wins by default" unless the other jurisdiction is clearly the more appropriate one. The question is not whether Nova Scotia is the more appropriate forum but whether Newfoundland and Labrador is clearly the more appropriate one.
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> [32] Section 12(2) of the *CJPTA* sets out the factors that must be considered in deciding whether another jurisdiction is clearly in a better position to dispose fairly and efficiently of the litigation. The circumstances relevant to the proceeding must be considered and the parties agree that the issue in this case is the comparative convenience and expense for the parties and their witnesses.

[11] Section 12 of the CJPTA lists the circumstances the court should consider when determining whether to decline territorial competence:

> **12** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
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> (b) the law to be applied to issues in the proceeding;
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> (c) the desirability of avoiding multiplicity of legal proceedings;
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> (d) the desirability of avoiding conflicting decisions in different courts;
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> (e) the enforcement of an eventual judgment; and
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> (f) the fair and efficient working of the Canadian legal system as a whole.

I am of the view that sub-section 12(2)(a) has the most application to this motion. It speaks of comparative convenience and expense to the parties: I will address the remaining section 12 factors further in this decision.

[12] I consider the following factors that support the Respondent's motion:

- All six Applicants were hired and dismissed in P.E.I., first by Transcontinental and then by SaltWire. All have worked in P.E.I. from between 19 years and 33 years. All six continue to reside in P.E.I.
- Any damages claimed by the Applicants arose in P.E.I. Further, mitigation is a significant issue in wrongful dismissal cases and the evidence of mitigation exists in P.E.I.

- All six Applicants worked under managers who presently reside in P.E.I. The majority of their co-workers reside in P.E.I. These are likely trial witnesses.
- SaltWire continues to operate in P.E.I. publishing The Guardian newspaper and its associated operations.
- All six Applicants were employed solely in P.E.I. and were not required to work in Nova Scotia. They were subject to P.E.I. statutory deductions and were covered by P.E.I. Workers Compensation. Notices were given in P.E.I.
- The majority of SaltWire's documentary evidence is located in P.E.I. including the Applicants' employment files.
- Approximately one-half of SaltWire's potential witnesses are presently residents of P.E.I.
- The Nova Scotia proceeding is in its infancy in that, other than this motion, nothing further has been done to advance the litigation.

The evidence satisfies me that the cost and convenience to SaltWire of litigating in P.E.I. will be minimal when compared to the cost and convenience to the Applicants litigating in Nova Scotia.

[13] I consider the following advanced factors that support the Applicants' opposition to the motion:

- SaltWire's head office and management are situated in Nova Scotia.
- The Respondent's employment contracts include the clause "This Agreement shall be construed in accordance with the law of the Province of Nova Scotia."

The fact that SaltWire's head office is in Nova Scotia is more relevant to territorial jurisdiction. It appears as if the Applicants are of the view that Nova Scotia *Civil Procedure Rule* 1.01 will ensure they receive a "just, speedy and inexpensive determination" of their case. I consider *Civil Procedure Rule* 1.01 to be highly aspirational. I have no reason to believe that the Supreme Court of Prince Edward Island would be any different in its approach.

[14] The Applicants rely on the clause that "This Agreement shall be construed in accordance with the laws of the Province of Nova Scotia." Their position is stated at page 9 of their Pre-motion Brief:

> The Applicant argues in its proceeding that these contracts are not binding on them and therefore that any termination entitlements would be calculated in accordance with the common law, which for the Applicants would be the common law as applied in Prince Edward Island (although the common law of employment is similar, if not identical, between the jurisdictions of Nova Scotia

> and Prince Edward Island). However, the Respondent's position ignores that the Respondent has indicated that it intends to consider the Applicants' employment contracts to be binding. Therefore, any assessment of the contracts, if they found to be binding on the Applicants (which the Applicants would deny) would require the employment contracts to be construed in accordance with the laws of Nova Scotia.

I find this submission non-persuasive.

[15] SaltWire recognizes that this clause could be an exception to the other factors that favour P.E.I. as the appropriate forum. SaltWire states at paragraph 56 of its Motion Brief:

> This term does not render Nova Scotia the more appropriate forum for this litigation. Indeed, in the particular circumstances of this Application and motion, SaltWire submits that this term should be given little if any weight.

SaltWire argues that the Applicants' position is that the subject employment contracts are void and consequently the subject term does not apply at all.

[16] SaltWire further states that even if the term is enforceable, it is not a choice of forum clause. It further states at paragraph 58 of its Pre-Motion Brief:

> It is a choice of law clause that is extremely limited in scope. Specifically, it relates only to the rules of construction (i.e. *construing* what the parties' intended by the contractual terms). The term does address what law the agreement or causes of action related thereto will be "governed" by.

SaltWire submits that the Notice of Application does not disclose any legal issue related to the construction of the employment contracts. In other words the subject clause does not amount to attorning to the laws of Nova Scotia. It relies on an

article written by Cynthia L. Elderkin & Julia S. Shin Doi entitled "Behind and Beyond Boilerplate: Drafting Commercial Agreements", 2nd ed (Toronto: Thomson Carswell, 2005), at page 83:

> Where no express choice of law clause has been drafted in the agreement, the proper law of the contract, as cited above, may be inferred from the circumstances or by the system of law with which the transaction has the closest and most real connection. In *Imperial Life Assurance Co. of Canada v. Colmenaries,*[168] the Supreme Court of Canada cited the following passage from *Cheshire on Private International Law* which described the factors that have been taken into consideration in determining the proper law of the contract (at 448):
>
> > The court must take into account, for instance, the following matters: the domicile and even the residence of the parties; the national character of a corporation and the place where the principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another….the economic connexion of the contract with some other transaction; … the nature of the subject matter or its situs; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

I am not persuaded that the subject clause creates the result that would dictate Nova Scotia to be the proper forum for this litigation.

[17] Section 12(2)(b) of CJPTA states "the law to be applied to issues in the proceeding". While there may be discreet differences between P.E.I. and Nova Scotia jurisprudence, they are not of such magnitude that they would change the playing field. Certainly the convenience and expense considerations would trump any differences between any legislative variances.

[18] Section 12(2)(c) of the CJPTA addresses “the desirability of avoiding multiplicity of legal proceedings”. I have no concerns that the issue of jurisdiction will result in such an outcome. Given the number of terminated employees from SaltWire, there will likely be similar actions in all jurisdictions where SaltWire does business.

[19] Section 12(2)(d) of the CJPTA addresses “the desirability of avoiding conflicting decisions in different courts”. Once again this factor does not concern me. All six Applicants bring different work experiences and factors into the litigation.

[20] Section 12(2)(e) of the CJPTA addresses “the enforcement of an eventual judgment”. SaltWire has operations in both P.E.I and Nova Scotia. There are instruments in place to ensure enforcement. I have no concerns that the Applicants, regardless of which court grants relief, will experience difficulties realizing their award.

[21] Section 12(2)(f) of the CJPTA addresses “the fair and efficient working of the Canadian legal system as a whole”. P.E.I. is not a developing jurisdiction. I cannot imagine how this factor comes into play in this motion.

[22] This Court has queried why SaltWire is motivated to see the proceeding moved to P.E.I. It seems to me that either province could conduct the litigation. It prompts the court to inquire into the motivations of SaltWire. In other words will SaltWire benefit financially if the case is heard in P.E.I. On the evidence before me, I cannot find an answer to my query and it may be that no advantage exists. Both provinces have similar justice systems and I would not venture to say one offers advantage over the other.

Conclusion:

[23] I am satisfied that P.E.I. is the proper forum for this litigation for the many reasons cited herein. I will decline to accept jurisdiction and suggest that the Applicants' pleading be re-filed in P.E.I. The Nova Scotia Application is stayed. In light of this outcome, I need not address SaltWire's alternative requests for relief.

Coady, J.